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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 782

JULIUS GOLDMAN and ELI SILVERMAN, d b a QUALITY FRUIT & PRODUCE CO.; SIMON L. KOTZEN, d b a SIMON L. KOTZEN & CO., *Petitioners*,

v.

H. HARRIS & CO., INC., MAURICE A. ALBERTSON, WILLIAM B. PONTEFRACT and JAMES F. GIOVINO, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners herein pray for issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered November 19, 1958, affirming the judgment of the United States District Court for the District of Massachusetts.

OPINIONS BELOW

The District Court handed down no opinion at the conclusion of the trial. Its opinion on petitioners' and respondents' cross-motions for summary judgment, rendered prior to trial of the case, on the pleadings and supporting affidavits and depositions, is reported at 152 F. Supp. 702, and appears in the appendix hereto (App. A, p. 1a, *infra*). The District Court's Findings of Fact and Conclusions of Law are reported at 160 F. Supp. 95; these are set out in the appendix hereto (App. B, p. 5a, *infra*). The opinion of the Court of Appeals is reported at 260 F. (2d) 958 and is also set out in the appendix (App. C, p. 19a, *infra*).

JURISDICTION

The judgment of the Court of Appeals was entered November 19, 1958. By order dated February 16, 1959, the time for filing this petition for writ of certiorari was extended to March 18, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254, subd. 1, 62 Stat. 928.

QUESTIONS PRESENTED

1. Whether an auction market which (a) is the only market in the New England area where citrus and deciduous fruit are sold to wholesalers on a public and competitive bid basis and (b) sells essential kinds and brands of such fruit not available to wholesalers elsewhere in the Greater Boston area, is a relevant market susceptible of being restrained and monopolized in violation of Sections 1 and 2 of the Sherman Act.

2. Whether three individuals, who organized a corporation for the purpose of controlling and operating

an auction market, control a majority of the corporation's stock, constitute its principal officers and its entire board of directors and agree on and decide among themselves the basic policies and operations of the market, are, by virtue of their status as corporate officers and directors, incapable of combining and conspiring to restrain trade in violation of Section 1 of the Sherman Act.

3. Whether wholesale buyers of fruit who, in violation of the antitrust laws, have been required to pay a charge of five cents for each box, crate, carton or other package of fruit bought by them, have been injured in their property or business, within the meaning of Section 4 of the Clayton Act.

STATUTES INVOLVED

Section 1 of Sherman Act

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . (15 U.S.C. Sec. 1; 26 Stat. 209, as amended).

Section 2 of Sherman Act

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . (15 U.S.C. Sec. 2, 26 Stat. 209)

Section 4 of Clayton Act

Any person who shall be injured in his business or property by reason of anything forbidden in the anti-

trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found, or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee (15 U.S.C. Sec. 15, 38 Stat. 731)

Section 16 of Clayton Act

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . (15 U.S.C. Sec. 26, 38 Stat. 737)

STATEMENT OF THE CASE

(a) General Outline of Complaint

This is a civil antitrust proceeding instituted under Sections 4 and 16 of the Clayton Act (15 U.S.C. Secs. 15 and 26) and Sections 1 and 2 of the Sherman Act (15 U.S.C. Secs. 1 and 2). The plaintiffs, hereinafter referred to as "buyers," are fresh fruit and vegetable jobbers doing business at the H. Harris auction market in Boston. The corporate defendant, H. Harris & Co., Inc., operates this auction market for the sale of produce at wholesale to the plaintiffs and other buyers. The individual defendants are the principal officers and the only directors, and own the controlling stock, of H. Harris & Co., Inc.

The principal allegation of the plaintiffs is that the defendants are, in violation of the Sherman Act, illegally collecting from the buyers a five-cent charge on every crate, package or box of fruit sold at the Harris auction. The complaint seeks treble damages and an injunction against this so-called "nickel charge."

(b) Nature of Harris Auction Market

Shippers of citrus and deciduous fruit (hereinafter referred to as "sellers") forward their products by rail or truck to the Harris auction for the purpose of having them sold, on a public, competitive bid basis, to the buyers doing business there. The citrus fruit (oranges, lemons and grapefruit) sold at the Harris auction market comes entirely from California, Arizona, Florida and Texas; most deciduous fruit sold there also comes from outside the New England area (Findings 18, 22, pp. 9a-11a, *infra;* R. 12).* The buyers at the Harris auction distribute their fruit to retail stores, restaurants and other institutions throughout New England, and into New York State and the Maritime Provinces of Canada (R. 74, 204).

In the Greater Boston area, the Harris auction market has a monopoly in fact of the sale of tomatoes, figs and Sunkist-brand oranges and lemons (Finding 43, p. 16a, *infra;* R. 183, 251-252, 259, 265-266, 275). The tomato business monopoly was obtained in consequence of a stock allocation to one di Mare described at p. 11, *infra*.

Sunkist-brand lemons account for more than 75% of the lemons sold at Boston (R. 131, 251-252). Sun-

* All record references are to the printed Record Appendix before the Circuit Court, and are designated herein as "R."

kist-brand oranges account for 60% to 65% of the California oranges marketed in the Boston area, and during three months of the year—June, July and August—are the only oranges available in commercial quantities in Boston (R. 295-296, 131). For five months of the year, the only eating oranges in Boston are California navels, of which Sunkist supplies the preponderant part (R. 265-266). Defendant H. Harris & Co., Inc.'s ten-year agreement with Sunkist is the only written contract which Harris has with any seller of fruit (R. 129-130; 326-331). Sunkist has no such agreement with any other enterprise in the New England area (R. 293).

Sunkist-brand citrus products "have a wide public acceptance due to extensive national advertising" (Finding 43, p. 16a, *infra*). Jobbers have to have Sunkist products in order to satisfy their customers and remain in business (R. 224, 234, 249, 273). Further evidence of Sunkist's indispensability to the jobbers is noted at pp. 16-17, *infra*.

The Harris auction market is the only regularly functioning market in the entire New England area where citrus and deciduous fruit is sold publicly and on a competitive bid basis (Findings 13, 15, pp. 8a-9a, *infra;* R. 204, 284). The only wholesale prices for fruit publicly available in the New England area are the prices obtaining at the Harris auction market. These Harris auction prices tend to be the basis for the prices subsequently quoted in privately negotiated sales. (R. 79, 152, 283-285).

In addition to the Harris auction, the principal markets in the Greater Boston area are the Boston Market Terminal Company and the Faneuil Hall Market. Neither of these last two is an auction market; sales

thereon are made by private negotiation (Findings 14, 15, 16, p. 9a, *infra*).

The Boston Market Terminal Company does not itself participate in the sale of fruit, but leases space to about forty receivers, who purchase or receive produce in carload lots and sell that produce to jobbers such as the plaintiffs (R. 110-112). While the receivers at the Boston Market Terminal offer a wide line of varieties of vegetable produce, sales of vegetable produce at the Harris auction are comparatively small (Finding 15, p. 9a, *infra*). The produce sold at Faneuil Hall Market is so-called "native" produce, i.e., produce grown in the New England area and mainly brought in from truck farms surrounding Boston (Finding 16, p. 9a, *infra*; R. 255, 106).

H. Harris Co., Inc. is

> ". . . for each individual transaction separately, the agent of the seller, with irrevocable authority to collect the whole proceeds of sale of each lot, and . . . holds the goods and the proceeds of the sale thereof for advances made or to be made by the Auction Company thereon; to or for the account of the seller . . . ." (R. 334).

A representative of the seller is always present at the left of the auctioneer and controls the sale (R. 203). The seller's representative can cut down the amount offered and can refuse to sell (R. 215, 287). He may decide to keep entire carloads of fruit "on the track" and off the auction for periods of time, occasionally as long as a week (R. 288, 303).

(c) The Nickel Charge

Prior to December 11, 1950, the sellers at the Harris auction were its only substantial source of income.

They paid to Harris a percentage commission, based on the gross sales prices received at the auction, plus an unloading charge ranging from $18 to $25 per car. The buyers were not required to pay anything beyond the price bid for the various products. (Findings 22, 23, p. 11a, *infra*)

On December 11, 1950, the Harris auction imposed on the buyers a charge of five cents on every crate, package or box of fruit bought by them at the auction, "and simultaneously revoked the unloading charge previously made to the shippers (sellers)" (Finding 25, p. 12a, *infra*).

The so-called nickel charge is paid by the buyers on every separate package, regardless of size, cost or difficulty of handling. At the time the nickel charge was first imposed, Sunkist oranges were sold in full packages. Currently, most of them are sold in half-packages, and a nickel is paid on each half-package (R. 203). A buyer of a small "strap" of figs has to pay a charge of 25 cents because the strap consists of five even smaller packages, and the buyer of a 15-cent or 50-cent watermelon must pay a five-cent charge, whereas the buyer of a $4.50 crate of oranges also pays only the five-cent charge (R. 180-181, 251).

Because of the summary disposition of this case by the District Court and a stipulation reserving the question of damages for subsequent determination (R. 37, 278), there was no occasion to present to the District Court the adverse effect of the nickel charge on the numerous buyers, who carry on small businesses involving large turnovers and small margins of profit.

Shortly after they acquired control of the Harris auction, the three individual defendants discussed the

nickel charge and adopted it as a policy (R. 122-123, 125). Since that time, on at least three or four other occasions, the defendants have considered and discussed the nickel charge, which was the subject of continuing protest (R. 123-128, 179, 335-336). The charge is still in effect. Neither when the nickel charge on the buyer was instituted nor during the period that the defendants have been collecting it, has there been any substantial change in the methods of operation that had been followed by the old partnership or in the services provided at the auction (Finding 30, p. 14a, *infra*; R. 200).

(d) Relation of Individual Defendants to the Harris Auction Market

For many years prior to 1950, four partners doing business as H. Harris & Co. operated a fruit and vegetable auction market in Charlestown, Massachusetts (Findings 20-30, pp. 10a, 14a, *infra*). When, in February 1951, it became known that the partners were willing to sell the Harris auction, defendant Pontefract was a buyer at the auction, and defendant Giovino a seller (R. 43, 44, 173). The two of them, together with two other buyers, formed a committee to inquire about the possibilities of acquiring the auction. They called a general meeting of receivers, wholesalers and jobbers for the night of March 14, 1951 (R. 86, 339-340). Pontefract addressed that meeting and asked those present if they would be interested in buying stock in the auction, if it were up for sale; the response was favorable. It was left that there would be a mass meeting on March 21, 1951. In the interim, the buyers were to indicate how many shares they might be interested in purchasing. (R. 46-47, 87).

Between March 14 and March 21, defendants Giovino and Pontefract met with defendant Albertson. Neither Stagnone nor Fiumara, the other two members of the committee, were present at this meeting or informed about it. Albertson stated that he would participate in the purchase of the auction, but only on the condition that the three of them (the individual defendants) would have control of the purchasing corporation. Albertson also stipulated that his identity be not revealed. (Finding 27, pp. 12a-13a, *infra;* R. 54, 116, 175-177).

At the mass meeting of March 21, 1951, Pontefract told those present that they had another party who would join in purchasing the auction, provided that that person, together with Giovino and Pontefract, would be able to have control of the company. The identity of this person was not revealed to those present. (R. 48, 54, 101). On March 26, 1951, the individual defendants, Pontefract, Giovino and Albertson, formed a Massachusetts corporation known as Fruit Orchard, Inc., the name of which was shortly thereafter changed to H. Harris & Co., Inc., the corporate defendant herein. A majority of the stock of this corporation has always been held or controlled by the three individual defendants. (Findings 27, 28, p. 13a, *infra*; R. 336-339).

Many buyers, including some of the plaintiffs, were not permitted to participate in the stock of H. Harris & Co., Inc. to the extent they desired (R. 163-164, 171). The individual defendants were permitted to buy all the shares they desired, but the remaining shares were allocated by defendant Giovino (R. 170-171, 245-246). Of the 2,500 shares of stock available for distribution, 425 shares were allocated to each of the three indi-

vidual defendants and 425 shares were allocated to one di Mare, the biggest tomato dealer in Boston, leaving only 800 shares available for general distribution (R. 162-163, 171, 138-139). The purpose of the stock allocation to di Mare was to obtain for the Harris auction market the tomato business, and to take it from the Boston Market Terminal, where it had previously been handled and where di Mare was doing business as a receiver (R. 183, 163-165).

Since the date of the incorporation of H. Harris & Co., Inc., the individual defendants have been its principal officers and the only members of its Board of Directors (Findings 2, 11, pp. 5a, 7a-8a, *infra*). The directors meet informally whenever they feel that something needs to be discussed; for example, there are no minutes reflecting any formal discussion of the nickel charge (R. 72, 121-122).

REASONS FOR GRANTING THE WRIT

The short *per curiam* opinion of the Circuit Court of Appeals in this case (see p. 19a, *infra*) upheld the District Court's findings of fact and judgment, but refrained from saying anything about the District Court's conclusions of law. The purpose of the argument which follows is not to challenge the District Court's findings of fact, but to show that its conclusions of law are in conflict with applicable decisions of this Court.

POINT I

The availability of supplies of important kinds and brands of citrus and deciduous fruits only at the Harris auction market, and that market's unique pattern of public auction sale, make it the relevant antitrust market in this case. The District Court's Conclusion of Law No. 3 to the contrary is in conflict with U. S. v. duPont, 351 U.S. 377, and other precedents of this Court

Crucial to the correct adjudication of any issue whether any part of trade and commerce has been restrained or monopolized in violation of Sections 1 and 2 of the Sherman Act is the prior correct delineation of the scope of the relevant market thus restrained and monopolized. The District Court, both in its opinion on the cross-motions for summary judgment (see pp. 3a-4a, *infra*) and its conclusions of law, recognized that the ultimate issues of antitrust liability could be decided only on the basis of a properly determined relevant market, and that its Conclusions of Law (Nos. 2 and 4) with respect to restraint of trade and monopoly were necessarily dependent on its Conclusion of Law No. 3 with respect to the scope of the relevant market (see p. 17a, *infra*).

Review is sought herein because the Court's legal conclusions are in conflict with *U. S.* v. *duPont*, 351 U.S. 377 (hereinafter referred to as the *duPont Cellophane* case), which for the first time laid down the general rules relating to inter-commodity competition and cross-elasticity of demand as determinants of a relevant antitrust market. Moreover, it is important that the rules laid down in the *duPont Cellophane* case for a commodity destined for industrial use be clarified with respect to food and other items that are marketed for individual consumption; confusion in this respect will have a detrimental and unsettling effect on the enforcement of the antitrust laws.

Conclusion of Law No. 3 of the District Court is as follows:

> "For the purpose of the Sherman Act, the relevant market, or line of commerce, to be considered in determining whether the Act has been violated is to be defined no more narrowly than as including the business of providing a market place for the purchase and sale of fresh fruit at wholesale in less than carload lots in the Greater Boston area."

The District Court, in its opinion on the petitioners' and respondents' cross-motions for summary judgment, indicated that the determination of the relevant competitive market in this case depended on "whether the alleged competitors" of the Harris auction market, i.e., Boston Market Terminal Company and Faneuil Hall Market, "offer a reasonable substitute for the services offered by the defendant," citing therefor the *duPont Cellophane* case (see p. 4a, *infra*). The same rationale is reflected in the Court's two findings of fact which are most germane to this issue, Nos. 41 and 42 (p. 16a, *infra*):

> "41. The Harris auction is in direct competition with BMT and, to the extent that similar produce is sold at the Faneuil Hall Market, in direct competition with Faneuil.
>
> "42. The extent to which Harris has effective control over the rate of charges which it makes to its customers (both sellers and buyers) is severely limited by a cross-elasticity of demand for the facilities, services and produce available at the Harris auction, the Boston Market Terminal, and the Faneuil Hall Market."

In short, the District Court took the view that the Harris auction market, the Boston Market Terminal

and Faneuil Hall Market constituted the single relevant antitrust market in this case, merely because all three markets served the common purpose of providing for the sale of fresh fruit at wholesale. It apparently deemed legally irrelevant the fact that the Harris auction market exclusively controlled supplies of essential kinds of citrus and deciduous fruit, and, in addition, employed a unique and advantageous competitive bidding pattern of sale.

This view of the District Court we consider contrary to the opinion of this Court in the *duPont Cellophane* case, which we believe supports the proposition that the Harris auction market, because of its factual monopoly of important varieties of citrus and deciduous fruit, is the relevant antitrust market for the purposes of this case. Independently, the position of the Harris auction market as the only market in the New England area which sells fruit at wholesale at publicly announced prices, and on the basis of competitive bids, serves to make it, as distinguished from the private negotiated sales taking place at Boston Market Terminal and Faneuil Hall Market, the relevant antitrust market.

In the *duPont Cellophane* case, this Court said (at p. 393):

> ". . . one can think of building materials as in commodity competition but one could hardly say that brick competed with steel or wood or cement or stone in the meaning of Sherman Act litigation; the products are too different."

Similarly, in this case, "the products are too different."

With respect to Faneuil Hall Market, as pointed out earlier (pp. 5, 7, *supra*), oranges, grapefruit, lemons

and other varieties of citrus (which come from California, Arizona, Florida and Texas) and deciduous fruits available at the Harris auction market are not available at Faneuil Hall Market, which sells primarily produce coming from the truck farms surrounding Boston. The District Court qualified its (to us legally irrelevant) finding that the Harris market and the Faneuil Hall Market were competitors, by pointing out that this was so "to the extent that *similar* produce is sold at the Faneuil Hall Market." (Finding 41, p. 16a, *infra*; italics supplied.) Since "similar produce" is not sold to any substantial extent on the Harris auction and at Faneuil Hall, the latter is not, on the basis of the District Court's own findings and premises, to any substantial extent a competitor of the Harris auction market.

A similar conclusion must logically apply with respect to the sales made by the receivers doing business at the Boston Market Terminal. Despite their common membership in the generic class of fruits and vegetables, the tomatoes or Sunkist oranges sold exclusively on the Harris auction market can hardly be said to "compete", within the meaning of the above quoted language of the *duPont Cellophane* case, with Coit watermelons and Andy Boy broccoli, to mention two products referred to in the record as exclusively sold on the Boston Market Terminal (R. 226; 234, 272-273, 276).

The District Court also found that:—

> "'Sunkist' brand citrus products, which are sold in the Boston area at wholesale and in less than carload lots only at the Harris auction, have a wide public acceptance due to extensive national advertising. They are nevertheless in direct com-

petition in the less-than-carload lot wholesale market in Boston with other brands of citrus products." (Finding 43, p. 16a, *infra*)

This finding by the Court does not, however, establish that the Harris auction market (selling only Sunkist-brand citrus products) and the Boston Market Terminal (selling other brands of citrus products) are part of a single wholesale, less-than-carload lot market. The relevant test is thus laid down in the *duPont Cellophane* case (at p. 400):—

> "If a *slight decrease in the price* of cellophane causes a considerable number of customers of other flexible wrappings to switch to cellophane, it would be an indication that a *high cross-elasticity* of demand exists between them; that the products compete in the same market. The court below held that the '[*g*]*reat sensitivity* of customers in the flexible packaging markets *to price or quality changes*' prevented du Pont from possessing monopoly control over price." (Italics supplied)

As Judge Learned Hand pointed out in *U. S.* v. *Aluminum Company of America*, 148 F. (2d) 416 (C.C.A. 2), there are limits even to a monopolist's power; "substitutes are available for almost all commodities, and to raise the price enough is to invoke them."

Applying the foregoing test to the facts of this case, it is abundantly clear from the record that retailers and consumers have an economic preference for Sunkist fruit that no other brand can satisfy, and that wholesalers could not satisfy their customers or remain in business unless they are able to obtain and supply Sunkist citrus fruit to their customers (see p. 6, *supra*). Of the two witnesses who were specifically examined concerning the price aspects of Sun-

kist's competition with other brands of citrus fruits, one testified that he could not stay in business unless he could buy Sunkist oranges (R. 249), but that, when Sunkist brand oranges "were selling tremendously high", his customers could not afford them and he sold no Sunkist (R. 266-267). The other said that, if the Sunkist price were 25 cents or 50 cents a package more than the non-Sunkist price, his customers still preferred Sunkist; even where the difference was *in dollars*, they still wanted some Sunkist, because they had a demand for Sunkist at their stores (R. 276-277). Thus, from the standpoint of trade and consumer acceptance, Sunkist-brand oranges represented the "cream" of the market. Cf. *International Boxing Club of New York, Inc.* v. *U. S.*, 358 U. S. 242, 252; *U. S.* v. *Paramount Pictures, Inc.*, 344 U. S. 131, 172-173. The inference seems inescapable, and is in no wise contradicted by the Court's finding, that there does not exist between Sunkist-brand citrus and other brands of citrus the "high cross-elasticity of demand" required by *duPont Cellophane* as a basis for the conclusion that "the products compete in the same market."

In view of the foregoing, it seems hardly necessary to do more than list the additional undisputed facts of record corroborating the status of the Harris auction market as a separate market for antitrust purposes — the distinctive public competitive bidding method employed in making sales at the Harris auction market, contrasted with the private negotiated sales transacted at the Boston Market Terminal and the Faneuil Hall Market (see Findings 15, 16; p. 9a, *infra*); the fact that H. Harris & Co., Inc. actually conduct the sales at the Harris auction, whereas Boston

Market Terminal Co. and Faneuil Hall Market merely make facilities available to the merchants who transact the sales thereon (see p. 7, *supra*); the effect of the prices publicly quoted on the Harris auction market upon the prices privately agreed on between shippers and receivers, and their respective customers (see p. 6, *supra*; cf. *U. S.* v. *Patten*, 226 U. S. 525); the obvious need of the buyers for a full line of fruit in sufficient quantities to satisfy the needs of their retailer, institutional and other customers; and other special advantages to the buyer of doing business at the Harris auction market, such as the buyer's knowledge of who the owner is of the fruit he is purchasing (R. 79-80) and the superior facilities of the Harris auction for enabling him to inspect the merchandise to be sold (R. 78, 80, 148-149).

Nor need it be labored that the District Court's conclusion as to the scope of the relevant market is on its face inconsistent with the First Circuit's decision in *Gamco, Inc.* v. *Providence Fruit and Produce Building, Inc.*, 194 F. (2d) 484 (C.C.A. 1) cert. denied 344 U.S. 817, holding the buying and selling of fruit and vegetables taking place at a single market terminal to be restrained and monopolized in violation of the Sherman Act. The *Gamco* case involved the application of the principles of *American Tobacco Co.* v. *U. S.*, 328 U.S. 781, and *U. S.* v. *Aluminum Company of America*, 148 F. (2d) 416 (C.C.A. 2), to a market situation involving an alleged illegal exclusion of a competitor, whereas our case involves the application of these principles to a market situation involving an alleged illegal fixing of price.

Assuming *arguendo* what we have thus far been disproving, i. e., that the Harris auction market and Boston Market Terminal constitute part of a single

integral antitrust market, the District Court erred in failing to take account of the fact that the Harris auction market accounts for such a large share of that "market," as to constitute it a part of trade and commerce susceptible of being monopolized and restrained in violation of the Sherman Act. Taking the second tabulation in the Court's Finding No. 18 (p. 10a, *infra*) and disregarding the fifth column thereof, which relates to direct retail sales, Harris' carload and percentage participation in aggregate fresh fruit sales at wholesale for the five-year period 1951 to 1955 is as follows:—

Year	Total Boston Wholesale Sales	Harris Auction Market Sales	Boston Market Terminal Sales
1951	12,274	4019 (33%)	8255
1952	12,147	3937 (32%)	8210
1953	11,610	4159 (36%)	7451
1954	10,088	4141 (41%)	5947
1955	9,080	3674 (40%)	5406

Harris' percentage occupation of this aggregate "market" has in a five-year period increased from 32 per cent to 40 per cent. The average carload contains from 950 to 1050 cartons of oranges, 900 to 1000 boxes of grapes, etc. (R. 135, 133), so it can be seen that the quantities traded over the Harris auction market are substantial. Taken either by themselves or in conjunction with the products and brands available only at the Harris auction market, the sales taking place at the Harris auction constitute "an appreciable part of interstate commerce under any standard" susceptible of monopolization and restraint in violation of the Sherman Act, see *U. S.* v. *Yellow Cab Co.*, 332 U.S. 218; *Indiana Farmers Guide Pub. Co.* v. *Prairie F. P. Co.*, 293 U.S. 268.

POINT II

The District Court's conclusion that the individual defendants in this case were, because of their status as corporate officers and directors, incapable of combining or conspiring to violate Section 1 of the Sherman Act, in addition to being wrong, violates fundamental policies of antitrust enforcement by making antitrust liability dependent on matters of form and disrupting the all-inclusive parallel coverage of Sections 1 and 2 of the Act

The District Court's Conclusion of Law No. 1 is: "The defendants did not combine or conspire among themselves, or with anyone else, to accomplish anything forbidden by the antitrust laws." This conclusion is basically premised on the Court's finding that the individual defendants in this case took no action "with respect to any matter within Harris' sphere of interest other than as officers and directors of Harris" (Finding 34, p. 15a, *infra*), and on the Court's interpretation of the so-called legal rule that a corporation cannot conspire with its own officers and directors. The rule itself has not been followed in some circuits. *Patterson* v. *U. S.*, 222 Fed. 599 (C.C.A. 6), cert. denied, 238 U.S. 635; *White Bear Theatre Corp.* v. *State Theatre Corp.*, 129 F. (2d) 600 (C.C.A. 8), and provoked a strong dissent in the leading case elaborating its rationale, *Nelson Radio and Supply Co.* v. *Motorola*, 200 F. (2d) 911 (C.C.A. 5), cert. denied, 345 U.S. 925.

Moreover, while the rule has not been specifically reviewed by this Court, it is logically inconsistent with some of its prior opinions. Thus it would appear irrational to hold, as this Court did in *U. S.* v. *Yellow Cab Co.*, 332 U.S. 218, that corporations controlled by a single individual could conspire with each other in violation of Section 1 of the Sherman Act, and yet hold that individuals, by mere virtue of their status as corporation officers and directors, cannot so conspire.

More important, if the rule is allowed to stand without qualification, it would undermine the effectiveness of antitrust enforcement, because it would unjustifiably enable individual defendants to evade their antitrust liabilities by hiding behind a corporate facade. It would destroy the all-inclusive parallel coverage of Sections 1 and 2 of the Sherman Act that runs like a thread through the Act's history, since the rule would immunize from the coverage of Section 1 agreements of individuals to do acts that would be violative of Section 2. The rule would therefore disrupt policies that have obtained since the classic case of *U. S. v. American Tobacco Co.*, 221 U.S. 106, 181, where Chief Justice White said:—

> ". . . as a result of the reasonable construction which was affixed to the statute, it was pointed out that the generic designation of the first and second sections of the law, when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed. That is to say, it was held that in view of the general language of the statute and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by any indirection the prohibitions of the statute."

If defendant H. Harris & Co., Inc. were a legal partnership instead of a corporation, there would be no doubt but that the individual partners could combine and conspire in violation of Section 1 of the Sherman Act. Yet from a realistic business standpoint, H. Harris & Co., Inc. is but an incorporated partnership. As pointed out on pages 9-11, *supra*, the

three individual defendants in this case organized the corporate defendant and have been its controlling stockholders from its inception. Two of the defendants, Pontefract and Giovino, had been the mainstays of a four-man committee, ostensibly representing the buyers at the Harris auction market, who were interested in the prospective purchase of the Harris auction. These two defendants for some time kept secret the identity of the third defendant, Albertson, as a prospective co-purchaser. However, they made no secret of the fact that they would not buy the Harris auction market unless the three of them could be assured of control. The individual defendants dictated the amounts of stock that would be available to the respective minority stockholders, to the necessary disappointment of those who had entertained expectations of greater stock participation. Once the corporate defendant was organized, the three individual defendants became (and have continued as) the three principal officers of the corporation—President, Vice-President and Treasurer—and the *only* members of its board of directors.

The rule that corporate officers cannot conspire among themselves becomes even more subversive of antitrust enforcement if applied, as in this case, to situations excluded from its scope in the *Motorola* case (see p. 20, *supra*). In that case the Circuit Court stressed that the officers of the defendant corporation were not actuated by any motive personal to themselves. Certainly this does not apply here. The individual defendants' control of the corporation is such that they act as partners would. They do not bother to distinguish between their actions as officers, and as directors, respectively, and hold very informal meetings not involving the keeping of minutes. The levying

of the challenged nickel charge on the buyers was of primary pecuniary consequence to the individual defendants as stockholders, and was not the mere act of corporate agents. In short, rather than the three individual defendants acting as agents for the defendant corporation, the defendant corporation is clearly the corporate agency and instrumentality of the three individual defendants.

The basic holding of the Court in the *Motorola* case was that there was no antitrust conspiracy "merely in the fact that the officers of a single defendant corporation did their *day to day* jobs in formulating and carrying out its *managerial* policy" (italics supplied), which in that case happened to be refusing to deal with individual distributors. The decision by the three individual defendants to levy the nickel charge, unlike the decision by a corporate officer to drop one of the corporation's many distributors, does not fit this characterization. The nickel charge has been the subject of a great amount of protest, "grumbling" and "griping", and marked a radical departure from the prior method of financing the operations of the Harris auction. Since it was imposed in 1950, there has been no significant change in the practices of the Harris auction market and only one change in its charges (a five-dollar-per-car charge imposed on the sellers in 1953—Finding 30, p. 14a, *infra*). In the light of these facts, the nickel charge can hardly be regarded as part of the individual defendants' "day to day job in formulating and carrying out [the] managerial policy" of the Harris corporation.

In conclusion, the District Court's effort to extend the decision in the *Motorola* case to the disparate facts of this one would prejudice a fundamental policy of

the Sherman Act, which is that antitrust liability is not to be frustrated by resort to accidents of form, see *Standard Oil Co.* v. *U. S.*, 221 U.S. 1, 61; *U. S.* v. *Masonite Corp.*, 316 U.S. 265, 278.

POINT III

The District Court's conclusion that the levying on the plaintiff buyers of an illegal five-cent charge on each crate, package or box of fruit bought by them on the Harris auction market did not constitute injury to plaintiffs' property or business, within the meaning of Section 4 of the Clayton Act, is in conflict with prior decisions of this Court; would unnecessarily bog down antitrust administration by prematurely requiring courts to adjudicate the issue of damages; and would impose on treble damage plaintiffs an impossible and unreasonable burden of proof that would frustrate the effectiveness of the treble damage remedy

In order adequately to state the issue whether the plaintiffs in this case have been injured in their property or business within the meaning of Section 4 of the Clayton Act, it is necessary to have a clear understanding of the state of the underlying record. First, it was stipulated at the trial that the plaintiffs paid the nickel charge in connection with all business done by them at the auction (R. 37). Second, the District Court's Conclusion of Law No. 5 (p. 17a, *infra*) is that there is no Section 4 Clayton Act injury in this case "[e]ven if the defendants had violated the Sherman Act by imposing or collecting the five-cent charge . . . ."; hence, we are entitled to assume, for the purposes of this discussion, that the nickel charge was an illegal overcharge imposed on the plaintiffs in violation of the Sherman Act.

Third, the plaintiffs, consistently with their view of the law and the purpose of the stipulation to conserve the time of the Court, made no special proffer of proof

on whether the nickel charge had, with respect to individual boxes, crates and packages of fruit, been absorbed by them or passed on to their customers. The District Court made no finding that plaintiff buyers passed on the nickel charge to their customers. The record, moreover, supports the inference that the plaintiff buyers did not have the power to pass on the five-cent charge to their customers, because it indicates that the buyers at the Harris action market had to resell their products in a highly competitive and shrinking market and encountered considerable sales resistance (Findings 17, 19, pp. 9a, 10a, *infra;* R. 227, 230, 271-272).

On the basis of a record and issues thus limited, the central question becomes:— Do the plaintiff buyers lay a basis for proving injury to their property or business within the meaning of Section 4 of the Clayton Act by establishing that they had to pay, on each crate, package or box of fruit, an illegal five-cent overcharge? Or were they required, at this stage of the proceedings, to establish, with respect to each such crate, package or box, that they absorbed the nickel charge and did not pass it along to their customers?

As is apparent from the District Court's findings (see Finding 44, p. 16a, *infra*), it took the latter view, i.e., that the plaintiffs, in addition to showing an illegally enhanced cost of doing business, must prove that they did not pass along the charge to their customers. The "two-step" theory thus adopted by the District Court is open to two lines of objection.

First, it obliterates the distinction between "injured in his property or business" and "damages" under Section 4 of the Clayton Act, and makes mere surplusage of the former phrase. If a plaintiff must show,

in order to establish his standing as a person "injured in his property or business," not only the payment of an illegal five-cent charge but that he absorbed the charge on the resale of individual crates, packages or boxes of fruit, what more can he conceivably show to establish the amount of his "damages"? That "injury to property or business" need not be identical with "damages" is evident from the cases holding that a treble damage plaintiff may not be able to establish his claim to damages, but may nevertheless be entitled to injunctive relief, see *Keogh* v. *Chicago & Northwestern Railway Co.*, 260 U.S. 156; *State of Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439. The only way of giving independent substance to Section 4 of the Clayton Act as conferring substanti.. standing to bring suit, without confusing such standing with the ultimate remedial issue of damages, is to treat the increased cost to the plaintiffs of doing business and their consequent loss of profits as sufficient proof of Section 4 Clayton Act injury.

The failure of the District Court to do this is in conflict with prior decisions holding that, where a person has been compelled by a combination or conspiracy to pay an excessive price, he is injured in his property within the meaning of Section 4 of the Clayton Act. *Thomsen* v. *Cayser*, 243 U.S. 66; *Chattanooga Foundry and Pipe Works* v. *City of Atlanta*, 203 U.S. 390; *Straus* v. *Victor Talking Machine Co.*, 297 Fed. 791 (C.C.A. 2). Moreover, if the District Court's error is not corrected, courts that wish to defer a decision on the frequently time-consuming and complex issue of damages, until such a decision is necessitated by an adjudication of antitrust liability, will be plunged

willy-nilly into the latter issue, at the cost of considerable judicial dis-economy.

The second major line of objection to the District Court's "two-step" theory is that, even as a statement of the rule as to damages, it is erroneous. In a treble damage case involving price discrimination under the Robinson-Patman Act, this Court has said that the amount of the illegal price difference is the amount of damages accruing to the plaintiff, *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 757. It would seem paradoxical to maintain that the victim of a Robinson-Patman price discrimination may recover treble the amount of the illegal discrimination, but that the victim of a Section 1 or Section 2 Sherman Act price violation may not recover treble the amount of an illegal overcharge. The latter result would be counter to what Justice Holmes has described as "the general tendency of the law, in regard to damages at least—not to go beyond the first step." *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533. It would, moreover, be tantamount to the emasculation of the treble damage remedy.

Counsel for respondents have cited, as supporting the District Court's "two-step" theory of damages, only one Supreme Court decision, the *Keogh* case cited on p. 26, *supra*. This case involved railroad rates subject to the primary jurisdiction of the Interstate Commerce Commission. In it the Court held that, if a shipper were to be allowed to recover treble damages for an antitrust injury (see p. 163):—

> "... the paramount purpose of Congress—prevention of unjust discrimination—might be defeated. If a shipper could recover under Section 7 of the

> Anti-Trust Act* for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors."

Although the remedy of treble damages did not lie under these circumstances, injunctive antitrust relief was clearly appropriate (*ibid.*, pp. 161-162). See, in accord, *State of Georgia* v. *Pennsylvania Railroad Co.*, *supra*, at page 457. There is in this case no policy paramount to that of the Sherman Act militating against recovery of treble damages.

The Circuit Court cases relied on by counsel for respondents were based on a *completed* record, both on issues of liability and of damages, and are distinguishable on various other grounds, one of the most important being that the record *conclusively established* that the increased cost *had been uniformly passed on* to the customer. See *Northwestern Oil Co.* v. *Socony Vacuum Oil Co.*, 138 F. (2d) 967 (C.C.A. 7), cert. denied 321 U.S. 792; *Clark Oil Co.* v. *Phillips Petroleum Co.*, 148 F. (2d) 580 (C.C.A. 8), cert. denied 326 U.S. 734. This is clearly not the case here, see pp. 24-25, *supra*.

Surely Congress, in establishing the private treble damage remedy as an aid to antitrust enforcement, did not contemplate the frustration of that remedy by imposing upon plaintiffs, as a prerequisite to the proof of their damages, the requirement of maintaining burdensome bookkeeping records entirely unrelated to the needs of their business. The "two-step" theory

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* This provision was similar to, and superseded by, Section 4 of the Clayton Act.

of damages endorsed by the District Court would require the plaintiff buyers to maintain detailed records from which can be traced the buying and selling prices of each individual box, carton, crate and package of fruit. This is an extravagant burden to impose on the plaintiffs, who are very small businesses dealing in thousands of packages of perishable commodities with constantly fluctuating selling and buying prices. Moreover, the requirement bears no ascertainable economic relationship to business realities, for a fruit jobber's gross profits are not a matter of tracing through the profits and losses on the sale and resale of thousands of individual packages of fruit, but a matter of his total inventory cost, which the nickel charge has illegally enhanced.

If the treble damage remedy is to remain the potent adjunct of antitrust enforcement that Congress envisaged, it is necessary that unreasonable and unfair rules concerning injury and the measure of damages, such as were employed in the court below, be avoided. Even if there were uncertainty as to the actual amount of damages incurred in this case, that is a risk which must be borne by the defendants once the element of wrongdoing has been established. "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery," *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555, 565-6. "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created," *Bigelow* v. *RKO Pictures, Inc.*, 327 U.S. 251, 263.

CONCLUSION

WHEREFORE, since this case presents issues which vitally affect the administration and enforcement of the antitrust laws, and the rulings of the District Court seem clearly to be in error and to undermine basic antitrust policies, it is respectfully submitted that this petition for a writ of certiorari be granted.

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Attorneys for Petitioners.

APPENDIX

APPENDIX

APPENDIX A

152 F. Supp. 702 (D. Mass.)

Memorandum of Decision on Motion for Summary Judgment

May 28, 1957

FORD, D.J.

This is an action under the antitrust laws to recover damages for alleged violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C.A. §§ 1 and 2. The plaintiffs are dealers in fruits and vegetables. The defendants who now remain in the case are H. Harris & Co., Inc., a Massachusetts corporation (hereinafter called Harris) and three individuals, Albertson, Pontefract and Giovino, who are the directors and principal stockholders of Harris, Pontefract being president of the corporation and Albertson its treasurer.

The business of Harris was conducted for many years by a partnership. In 1951 the present corporation was formed (originally under the name of Fruit Auction, Inc.) by a group of customers of the partnership, with the individual defendants as principal shareholders, which purchased the partnership assets and thereafter carried on the business.

Harris conducts an auction market for the sale of citrus and deciduous fruits by shippers or receivers who act as agents for the shippers. These sellers notify Harris of shipments of produce they wish to sell. Harris then arranges with the carriers for delivery to its warehouse, unloads the produce, displays sample packages, and prepares a catalogue of items offered for sale. All produce is sold at auction, subject to withdrawal by the seller if a minimum price fixed by the seller is not bid. Any person who meets certain credit qualifications may buy. Plaintiffs are all buyers at these auctions. Upon the sale of the produce Harris keeps a record of the transaction, pays the seller, supervises delivery to the buyers, and then bills the buyers and collects from them.

Harris charges each seller a commission based on a percentage of the selling price of its produce. It also collects from the buyer a charge of five cents for each individual package purchased, regardless of the size and contents of the package. It is this five cent charge of which plaintiffs complain.

Each side has moved here for summary judgment. While there is no complete agreement on the facts, it appears to be the contention of each party that on the basis of certain facts asserted by it and not controverted by the opposing parties, it is entitled to judgment as a matter of law and that other facts alleged by the opposing parties are immaterial to the decisive issues of the case.

On consideration of the contentions advanced by the parties, it does not appear that the issues here resolve themselves into clear cut questions of law which can be resolved on the basis of a selection of facts which are not controverted, but rather that the solution of each of the issues involved requires a further development of the factual background.

The first charge of plaintiffs is that defendants have engaged in a combination or conspiracy in restraint of trade in violation of § 1 of the Act. Defendants argue that there can be no conspiracy among these defendants since they are a corporation and its principal officers and directors. It is generally true that the acts of the agents of a corporation in carrying out their duties of formulating the policy of the corporation do not constitute a conspiracy violative of § 1 of the Act. *Nelson Radio & Supply Co. v. Motorola*, 200 F.2d 911, 914. But plaintiffs do not rely merely on this, but claim they can prove that in fact the individual defendants here conspired to form the defendant corporation as a mere instrumentality to take over the partnership business as a step in securing control of the market and imposing a restraint of trade for their individual benefit. The validity of this contention depends on proof of facts which defendants do not concede.

Similarly defendants say there has been no restraint of trade because statistics show business has increased and many of the individual plaintiffs have prospered in recent years. This is not conclusive. On the facts now before the court it cannot be said whether because of other factors business may not have been profitable in spite of restraints. So also the conflicting contentions as to whether or not the five cent charge has affected the price at which plaintiffs can resell their fruit, or the profits realized by them on resale require a knowledge of more of the facts as to how their business is carried on. Defendants also argue that if there is any restraint of trade imposed, it is reasonable. But assuming that, as defendants claim, they must have the revenue produced by the five cent charge or its equivalent from some other source, the court has no facts on which to decide whether it would be possible for them to increase their charges to the shippers or whether it would be practicable to collect a charge from the buyers on another basis than that of a flat rate per package.

Plaintiffs' position is that the collection of any charge from the buyers is illegal. Again there are not enough facts before the court to enable it to make any such sweeping ruling at this stage of the proceedings, or to hold that, even if the charge is illegal, it creates a restraint of trade in violation of the Sherman Act.

The complaint further charges illegal monopolizing on the part of defendants in violation of § 2 of the Act. To decide whether defendants have a monopoly it must first be decided what the limits are of the relevant competitive market in which defendants offer their services. *United States* v. *duPont & Co.*, 351 U.S. 377, 394. The parties are not agreed on what the relevant market is. The complaint refers to the market in New England for the sale of citrus and deciduous fruit. Plaintiffs now seem to rely on a market limited to the sale of one particular brand of citrus fruits at auction in Boston. Defendants argue that the relevant market should be considered as including

all sales of citrus fruits at less than carload lots, whether by auction or negotiated sale. To decide the proper limits of the market, it must be determined whether the alleged competitors offer a reasonable substitute for the services offered by defendants. *United States* v. *duPont*, supra. There are no facts now before the court on which it can decide this question.

The case, therefore, is not at least at the present stage of the proceedings a proper one for summary judgment and the motions of plaintiffs and defendants for summary judgment are denied without prejudice.

APPENDIX B

160 F. Supp. 95 (D. Mass.)

Findings and Conclusions

February 28, 1958

FORD, D.J.

A. *Procedural History of Case*

1. The plaintiffs' complaint, filed on February 27, 1956, alleged that the defendants had combined and conspired unreasonably to restrain and monopolize the marketing and sale of fresh citrus and deciduous fruits in the New England area by imposing and exacting from buyer customers at the wholesale produce auction maintained by the defendant H. Harris & Co., Inc. (hereinafter called "Harris") a five-cent charge per each package of produce sold through the Harris auction, all in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2). The complaint further alleged that the plaintiffs, who are among those who have been required to pay the five-cent charge, are entitled to recover three-fold the charges paid by them under Section 4 of the Clayton Act (15 U.S.C. § 15).

2. In addition to Harris, there are three individual defendants; Maurice A. Albertson, William B. Pontefract, and James F. Giovino, who are the three directors and principal officers of Harris.

3. The defendant's answers denied the allegation of the complaint that the Harris auction "is the only market in New England at which citrus and deciduous fruits can be purchased from the packer or grower in less than carload lots"; denied that the defendants had initiated the five-cent charge upon which the complaint is based; admitted that Harris had continued the schedule of charges (including the five-cent charge) previously employed by H. Harris & Co., a partnership whose assets Harris had acquired; and denied that the five-cent charge is in any way unreasonable or illegal.

4. The complaint originally named S. Albertson Company, Inc. as an additional party defendant and co-conspirator. However, on January 21, 1957 the Court granted the motion of S. Albertson Company, Inc. for summary judgment on the basis that, with minor exceptions, neither S. Albertson Company, Inc. nor Harris "has any interest in the business of the other, and the policies of one have no connection with policies of the other."

5. The complaint originally joined 33 business establishments, (corporations, partnerships, and individual proprietorships) as parties plaintiff, all of whom were described as buyers at the Harris auction. However, on February 14, 1957, fourteen of these establishments were dismissed with prejudice as parties plaintiff for wilful failure to submit to examination upon deposition.

6. On May 28, 1957, the motions of the plaintiffs and the defendants for summary judgment were denied on the basis that there were insufficient facts in the record upon which to support a judgment for either party.

7. On October 18, 1957, the defendants' motion to amend their answers so as to set up the defense of laches and statute of limitations was granted.

8. During the course of the plaintiffs' oral argument in opposition to the defendants' motion to dismiss, made under Rule 41(b), at the close of the plaintiffs' case, the plaintiffs moved to amend their complaint to include, *inter alia*, an allegation of breach of fiduciary duty owed by the defendants to the plaintiffs. This motion was granted without objection by the defendants.

B. *Identification of Parties*

9. Harris is engaged in maintaining facilities and furnishing services in connection with the sale of fresh fruit and vegetable produce at the public auction market which it operates, and this has been its sole business since its

inception. Harris does not own any produce nor does it act for any person in the purchase or sale of produce, except that it acts for the sellers in collecting for them the proceeds of sales.

10. The plaintiffs, of whom 19 have remained in the action since February 14, 1957, are primarily wholesale fresh fruit and vegetable jobbers who describe themselves as "buyers" for the purpose of this action. For the most part, these jobbers buy produce for their own account in less than carload lots at various wholesale markets, including the Boston Market Terminal (BMT) and the Harris auction. Sometimes they buy at these markets direct from the grower or packer of the produce, sometimes from the shipper and sometimes from a broker or receiver. The matter of what distributive level the seller is at is of no practical significance to these buyers. In turn, they sell primarily to retail stores, but also to pushcart pedlars, restaurants, hotels, and other institutions. Two of the plaintiffs are primarily brokers—that is, they purchase produce at the wholesale markets, including the Harris auction, for the account of others, collecting a commission for their services.

11. The individual defendants are each engaged in aspects of the produce business separate from the business of Harris. William B. Pontefract, President and Director of Harris, is the owner of Brown, Pontefract, a brokerage company, which is engaged mainly in the purchase of produce in the Boston wholesale markets for the account of produce firms in the Maritime Provinces. A considerable portion of these purchases are undertaken at the Harris auction. Pontefract has been inactive in the Brown Pontefract Company in recent years.

Maurice A. Albertson is General Manager of S. Albertson Company, Inc., a firm of commission merchants engaged in shipping and receiving fresh fruit and vegetable

produce to and in various eastern markets. This corporation does very little business at the Harris auction.

James F. Giovino, Vice President and a Director of Harris, is a partner in Giovino Bros., which is a shipper's representative in the sale of produce in the Boston wholesale markets, including the Harris auction, on a commission basis. The business of the firm is largely conducted by Mr. Giovino's brother.

C. *Economic Background*

12. The facilities which Harris maintains consist of a warehouse and office building in the South Boston yards of the New York, New Haven & Hartford Railroad which it subleases from its subsidiary, N. Harris Realty Co., Inc. In this building are produce warehouse facilities, auction rooms; rooms for buyers and sellers, and miscellaneous offices, including the office of Harris itself. Contiguous to the building are sidings and other facilities for the unloading of freight cars and trucks into the warehouse.

13. Among the services which Harris offers to its customers are the following:

(a) Arrangements with the New Haven Railroad and with trucking concerns for placement of incoming cars and trucks of produce;

(b) Unloading incoming cars and trucks, checking contents against manifests, and segregating and stacking produce in the Harris warehouse according to variety, brand, size, and lot number;

(c) Printing and distribution to sellers and buyers of daily catalogues which describe each lot of produce to be offered for sale during the next auction;

(d) Opening of random crates in each lot for inspection by buyers;

(e) Providing auction personnel and uniform rules for conduct of the auction;

(f) Handling of all billing and accounting procedures among carriers, sellers, and buyers;

(g) Extension of credit to buyers;

(h) Guaranteed protection against loss, damage, errors in manifests, and pilferage;

(i) Delivery of produce to buyer or his assignee.

14. In addition to the Harris auction, the principal wholesale produce markets in Boston are the BMT and the Faneuil Hall Market.

15. BMT is operated by the Boston Market Terminal Company. Transactions at BMT, as at the Harris auction, are primarily in less than carload lots, but are in the form of private, negotiated sales rather than public auction sales. In addition to fruit, a wide line of varieties of vegetable produce is offered for sale at the Boston Market Terminal, whereas at the Harris auction sales of vegetable produce are comparatively small.

16. The Faneuil Hall Market is concerned largely with the offering at privately negotiated sale of native produce at wholesale in less than carload lots.

17. A substantial proportion of the fresh fruit and vegetable produce shipped annually into Boston is shipped directly by the grower or packer, or by his consignee, to large supermarkets and grocery chains. The sales involved in this volume are largely in carload lots. The large supermarkets and chains are in direct competition with the plaintiffs' customers, and the growth of the former has reduced the volume plaintiffs can sell.

18. During the calendar years 1951 through 1955 the number of carloads (including truckloads) of fresh fruit

and vegetable produce shipped into the Boston area were as follows:

Calendar Year	Boston Total	Harris	BMT	Chain Stores & Others
1951	45,661	4023 (8.8%)	16,137 (35.34%)	25,501 (55.86%)
1952	46,476	3939 (8.5%)	16,764 (36.07%)	25,773 (55.43%)
1953	48,426	4174 (8.6%)	16,643 (34.36%)	27,609 (57.04%)
1954	49,321	5126 (10.4%)	15,867 (32.17%)	27,328 (57.43%)
1955	47,279	5325 (11.3%)	16,021 (33.89%)	25,933 (54.81%)

During the same period the number of carloads (including truckloads) of fresh fruit shipped into the area were as follows:

Calendar Year	Boston Total	Harris	BMT	Chain Stores & Others
1951	13,808	4019 (29.11%)	8255 (59.78%)	1534 (11.11%)
1952	15,712	3937 (25.05%)	8210 (52.25%)	3572 (22.70%)
1953	17,610	4159 (23.62%)	7451 (42.31%)	6000 (34.07%)
1954	17,671	4141 (23.43%)	5947 (33.65%)	7583 (42.92%)
1955	16,761	3674 (21.92%)	5406 (32.25%)	7581 (45.83%)

19. For some years the wholesale fresh fruit and vegetable produce business in the Boston area has encountered substantial competition from the frozen and canned fruit and vegetable business and from the canned and concentrated fruit juice business.

D. Chronology of Events

20. The partnership of H. Harris & Co., which had operated the Harris auction for many years prior to 1951, experienced a serious decline in its volume of business during the years following the war, a situation which was exacerbated by increases in its cost of operation. During the years 1941 through 1950, its volume (expressed in carloads) was as follows:

1941—9325	1946—4226
1942—6836	1947—5671
1943—4650	1948—5282
1944—4116	1949—4753
1945—3489	1950—4024

21. In the face of this decline, the Harris partnership determined that it must increase its revenues if it was to continue in business. Accordingly, it discussed with various shippers (sellers) the possibility of increasing the charges paid by the shippers for the privilege of using the facilities and services of the auction. However, these shippers stated that they would not pay increased charges and pointed out that the decline in the volume of the Harris auction was in significant part due to diversion of shipments to other markets by reason of the already high schedule of charges which were collected from shippers by the Harris auction in connection with shipments to it.

22. In 1950, as in years past, shippers of produce to the Harris auction were required to pay percentage commissions on each box or crate of produce sold by them at the auction, the rate varying according to the variety of produce involved, as follows: California and Arizona citrus, 1¾%; Florida and Texas citrus, 2%; deciduous fruits, 1¾%; *Exceptions:* Pineapples, 2%; Watermelons, 3%; other melons, 2½%; Vegetables, 2%; Imports, 2%; Minimum, $15.00; ullages and broken packages, 8%, plus 5¢ per package for moving.

23. These commissions plus unloading charges (also levied upon shippers) amounting to from $18.00 to $25.00 per car, were, with minor exceptions, the only sources of income received by the Harris auction. The buyers were charged nothing for the privilege of doing business at the Harris auction, despite the fact that for many years it has been the practice in most of the other auctions in the principal cities of the United States for the buyers to bear a measure of the cost, including, specifically unloading charges.

24. Following the unsuccessful talks of the partnership with various shippers, the partnership called in about a dozen of the principal buyers at the auction during the latter part of November, 1950, and explained the partner-

ship's predicament to them. At this meeting the partners proposed to the buyers that they pay a five-cent charge to the Harris partnership for every crate, package, or box purchased by them at the auction, in order that the buyers might bear some measure of the cost of operation and to permit the partnership to attempt to increase the volume of shipments to the auction by excusing the shippers from responsibility for paying unloading charges. Despite expressions of distaste for the proposed five-cent charge, the buyers who attended this meeting concluded that they would go along with the proposal. Following this meeting, and prior to promulgation of the charge, a meeting of the buyers as a whole was held in the auction room of the Harris auction in Charlestown to consider the charge. Again there was some grumbling, but a general acquiescence in the charge by the buyers was manifested.

25. On December 11, 1950, the Harris partnership placed the five-cent charge per package into effect and simultaneously revoked the unloading charge previously made to the shippers. This five-cent charge has remained in effect ever since.

26. Sometime during February of 1951, the Harris partnership concluded that despite the institution of the five-cent charge, its losses were such that it could no longer continue in business. Accordingly, during the latter part of February, the partnership let it be known that it was willing to sell the partnership assets. A number of persons became interested in the possibility of purchasing these assets, including some of the customers at the Harris auction (both sellers and buyers) and a New York group.

27. Messrs. Pontefract and Giovino, who were interested in keeping the auction in existence, talked with a number of the Harris auction customers, as well as with other persons in the wholesale produce business, including defendant Albertson, and concluded that there was sufficient interest in investing in a new corporation to pur-

chase the auction to warrant their opening negotiations to this end with the Harris partnership. At some time during the week ending March 21, 1951, Messrs. Pontefract and Giovino talked with Mr. Albertson concerning the possibility of forming a new corporation to take over the partnership assets, and Albertson agreed to join forces with them, provided that the three of them would control 51% of the stock in the new corporation. Albertson was interested in investing in the auction, assuming that control was to be placed in competent hands, since he was convinced on the basis of a conversation with Mr. Dumaine, Sr. of the New Haven Railroad that the auction could be moved to the South Boston yards of the New Haven and operated at a profit there. Pontefract and Giovino agreed to Albertson's conditions.

28. The upshot was that the three men formed a new corporation under the laws of Massachusetts called Fruit Auction, Inc., in which they became the controlling stockholders, with the balance of the shares being held primarily by customers of the Harris auction. On March 27, 1951, Fruit Auction, Inc. entered into an agreement with the Harris partnership for purchase of the latter's assets at a formula price, plus assumption of partnership losses since January 1, 1951, up to a limit of $12,000. On the closing date specified by this agreement; April 18, 1951, Fruit Auction, Inc. took over the partnership assets (paying the formula sum plus $12,000 therefor) and shortly thereafter it changed its name to H. Harris & Co., Inc.

29. While Pontefract and Giovino, in the process of interesting customers of the old Harris auction (including some of the plaintiffs herein) in investing in the new corporation, told these customers that they were negotiating with the Harris partnership for the purchase of its assets, they made no promise to negotiate on behalf of anyone other than themselves and Mr. Albertson, and they received no promise, benefit or other consideration from anyone in

return for conducting such negotiations and organizing the new corporation.

30. Following acquisition of the Harris auction, the defendants made no change in the practices, services, or charges of the Harris auction until September of 1953 when the defendants moved the auction from its place of business in the Charlestown yards of the Boston and Maine Railroad to its present location in the South Boston yards of the New York, New Haven & Hartford Railroad. Effective as of the time of this move, Harris promulgated a new charge of five dollars per car to compensate for the increased rental which Harris was required to pay at the new location. Since September 1, 1953, this charge has been paid by the sellers.

E. *Conspiracy: Restraint of Trade*

31. The purpose of the individual defendants in organizing Harris and in causing Harris to purchase the assets of the old partnership was to keep the auction in business and to operate it efficiently so that they might have an adequate return on their investment. At all times since their initial consideration of taking over the auction, the individual defendants have expected that Harris would compete with other markets, including especially BMT.

32. In acquiring control of the Harris auction and operating it since 1951, the defendants have neither engaged in predatory business practices nor sought to restrain or monopolize the marketing or sale of fresh fruit or vegetable produce in either the New England or the Greater Boston area.

33. At no time did any of the defendants promise to eliminate or reduce the five-cent charge which had been initiated by the Harris partnership; nor did the partnership require that the five-cent charge be eliminated or reduced as a condition of the sale of its assets.

34. During the period that the individual defendants have controlled the Harris auction, they have operated it at a profit to Harris. They have done so without discriminating in favor of themselves or of their individual companies. There is no evidence that they have ever taken any action with respect to any matter within Harris' sphere of interest other than as officers and directors of Harris.

35. There is no evidence that the five-cent charge caused or tended to cause; a decrease in the volume of purchases at the auction; a loss in gross or net revenue to the plaintiffs; a decrease in competition among sellers or buyers at the wholesale level; a decrease in the number of buyers at the auction; an increase in prices of citrus or deciduous fruits in the wholesale market in Boston; a discrimination between particular buyers or sellers; or a decrease in the volume of shipments to the Boston area.

36. There is evidence that the five-cent charge, together with the concomitant removal of the unloading charge formerly imposed upon the shippers (sellers), tended to increase the volume done at the Harris auction at the expense of the volume done at the Boston Market Terminal, and therefore tended to increase competition between the Harris auction and the Boston Market Terminal.

37. It is likely that Harris, if it had eliminated or reduced the five-cent charge, would have been unable to obtain compensating revenue from the sellers without substantially reducing the volume of shipments to the auction, and that if the volume of shipments of produce to the Harris auction were substantially reduced, Harris would eventually go out of business.

38. The facilities and services of Harris which are made available to the plaintiffs and other buyers are of substantial benefit to such buyers.

39. The evidence tends to indicate that the amount of the charge made to the buyers (i.e., the five-cent charge)

is reasonable and not disproportionate either to the value to the buyers of the facilities and services enjoyed by them or to the cost to Harris of providing those facilities and services.

F. *Monopoly*

40. All of the concerns (including the plaintiffs) which normally buy produce at the Harris auction also regularly buy produce at BMT, and most of the sellers at BMT also sell at the Harris auction. Many of the buyers at Harris and BMT also purchase produce at the Faneuil Hall Market. Considerations of comparative price constitute the primary factor in determining whether these concerns satisfy their current requirements at the Harris auction, BMT, or the Faneuil Hall Market. Fluctuation of prices at all three markets is substantially determined by the laws of supply and demand.

41. The Harris auction is in direct competition with BMT and, to the extent that similar produce is sold at the Faneuil Hall Market, in direct competition with Faneuil.

42. The extent to which Harris has effective control over the rate of charges which it makes to its customers (both sellers and buyers) is severely limited by a cross-elasticity of demand for the facilities, services and produce available at the Harris auction, the Boston Market Terminal, and the Faneuil Hall Market.

43. "Sunkist" brand citrus products, which are sold in the Boston area at wholesale and in less than carload lots only at the Harris auction, have a wide public acceptance due to extensive national advertising. They are nevertheless in direct competition in the less-than-carload-lot wholesale market in Boston with other brands of citrus products.

44. There is no evidence as to whether those of the plaintiffs who purchase produce at the Harris auction for their own account have absorbed the five-cent charges in whole or in part or have passed them along to their vendees.

45. While the two plaintiffs who purchase produce at the Harris auction for the account of others may have lost occasional commissions because of inability to fill customers' orders at the maximum price fixed by the customers (after taking into consideration the five-cent charge), these plaintiffs could not even approximate the number or dollar value of such losses, and they admitted that they have no records to substantiate the facts of such losses.

Conclusions of Law

1. The defendants did not combine or conspire among themselves, or with anyone else, to accomplish anything forbidden by the antitrust laws.

2. The five-cent charge did not impose or constitute a restraint of trade within the meaning of Section 1 of the Sherman Act. It has not tended to suppress competition within the Greater Boston less-than-carload-lot wholesale produce market and was a reasonable charge under all of the circumstances.

3. For the purpose of the Sherman Act, the relevant market, or line of commerce, to be considered in determining whether the Act has been violated is to be defined no more narrowly than as including the business of providing a market place for the purchase and sale of fresh fruit at wholesale in less than carload lots in the Greater Boston area.

4. The defendants have neither exercised nor possessed power over prices or competition in the relevant market, nor have they ever attempted to exercise or acquire such power.

5. Even if the defendants had violated the Sherman Act by imposing or collecting the five-cent charge, the plaintiffs have not been injured in their respective businesses or property within the meaning of Section 4 of the Clayton Act by reason of such charge.

6. Neither Pontefract nor Giovino nor Albertson breached any fiduciary duty to any of the plaintiffs since they stood in no agency relationship fiduciary or otherwise, with any plaintiff in respect to any transaction disclosed by the evidence.

APPENDIX C

~~132 F. Supp. 920~~
260 F. (2d) 957
Opinion of the Court

November 19, 1958

PER CURIAM. This appeal involves an action for treble damages under the federal anti-trust laws. We are entirely satisfied that the findings of fact by the district court were amply supported by the evidence, and that on these findings the district court had to enter the judgment it did, namely, a judgment dismissing the action on the merits.

A judgment will be entered affirming the judgment of the District Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 782

JULIUS GOLDMAN, ET AL., *Petitioners*

v.

H. HARRIS & CO., INC., ET AL., *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR ALL RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR ALL RESPONDENTS IN OPPOSITION

Opinions Below

The District Court rendered no opinion on final judgment, but the Findings of Fact [1] and Conclusions of Law [2] (Pet. 5a-18a),[3] which it handed down in connection with granting defendants' motion to dismiss at the close of

[1] Hereinafter abbreviated as "F/F".
[2] Hereinafter abbreviated as "C/L".
[3] "Pet." references are to the petition for certiorari.

plaintiffs' case, are reported at 160 F. Supp. 95. The opinion of the Court of Appeals (Pet. 19a) affirming, *per curiam*, the judgment of the District Court is reported at 260 F.2d 958.

Questions Presented

1. Whether the wholesale fruit and vegetable auction market operated in Boston by defendant-respondents in direct competition with two other Boston wholesale fruit and vegetable markets is itself a relevant market for purposes of Section 1 and 2 of the Sherman Act.[4]

2. Whether the defendant-respondents unreasonably restrained, monopolized, or attempted to monopolize, the marketing and sale of citrus and deciduous fruits in the New England area by making a five-cent charge to the plaintiffs and others similarly situated.[5]

3. Whether, even if there had been any restraint or monopolization, the plaintiff-petitioners made a showing of injury in their business or property sufficient to sustain an action under Section 4 of the Clayton Act.[6]

Argument

REASONS WHY THE WRIT SHOULD BE DENIED.

1. *None of the Criteria of Supreme Court Rule 19 Has Been Met.*

Although the petition contains no clear or coordinated statement of the reasons why it is believed that the writ

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[4] 15 U.S.C. Secs. 1-2, 26 Stat. 209, as amended.

[5] This is the nub of the offense charged in plaintiffs' complaint. See Record Appendix in Court of Appeals (hereinafter referred to as "R."), at pp. 14-15.

[6] 15 U.S.C. Sec. 15, 38 Stat. 731.

should be granted, petitioners apparently claim that there is a conflict of court of appeals decisions (Pet. 20) [7] and that the judgment of the District Court conflicts with decisions of this Court (Pet. 12, 20, 21, 26 and 29).

The alleged conflict between courts of appeals decisions is said to involve the rule that a corporation cannot conspire with its own officers if they are acting solely within the scope of their employment.[8] The petitioners claim that *Patterson* v. *United States*, 222 Fed. 599, and *White Bear Theatre Corp.* v. *State Theatre Corp.*, 129 F.2d 600, state an opposing view. This is incorrect. In the *Patterson* case this question was not considered; and in the *White Bear* case the charge was an attempt to monopolize under § 2 of the Sherman Act, no question of conspiracy under § 1 having been involved.

We will deal below with the claims of the petition that the judgment of the District Court is in conflict with decisions of this Court on the issue of "relevant market" under § 2 of the Sherman Act [9] and on the question of the showing which a plaintiff must make in order to maintain suit under § 4 of the Clayton Act.[10] Suffice it to say at this juncture merely that the cases on damages cited by the petitioners at page 26 are not in conflict with the principle of law underlying Conclusion of Law 5, as supported by Findings of Fact 35-39 and 44-45. Moreover, *Story Parchment Company* v. *Paterson Co.* and *Bigelow* v. *RKO Pic-*

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[7] The petition also claims that there is a conflict between the opinion of the District Court in this case and the First Circuit's decision in *Gamco, Inc.* v. *Providence Fruit and Produce Building, Inc.*, 194 F.2d 484, cert. den. 344 U.S. 817 (1952). The First Circuit itself was apparently unimpressed by this argument, as is evidenced by its *per curiam* one-paragraph affirmance of the District Court's decision here.

[8] See pp. 8-9, *infra*.

[9] See pp. 4-8, *infra*.

[10] See pp. 10-12, *infra*.

tures Inc., cited in the petition on page 29, are not relevant in context.[11]

Accordingly, it appears that the petitioners fail to state a proper case under Rule 19 of this Court.

2. *The Issues Raised by the Petition Are Academic.*

A further reason for denying the writ is that if the points raised by the petition are considered in the light of the whole case they are seen to be peripheral only and of no practical importance to the parties or the public at large.

The petition does not address itself to the central questions of whether any unreasonable restraints have been imposed on trade or commerce or whether the defendant-respondents have monopolized or attempted to monopolize.[12] Yet until these fundamental questions are answered in the affirmative,[13] the three points argued by the petitioners are of academic interest only.[14]

B. The Relevant Market Is To Be Defined No More Narrowly Than the Business of Providing a Market Place for the Purchase and Sale of Fresh Fruit at Wholesale in Less than Carload Lots in the Greater Boston Area.

Purporting to rely on *United States* v. *du Pont & Co.*, 351 U.S. 377 (1956) (the *du Pont Cellophane* case), peti-

[11] The issue in those cases was not whether the plaintiffs had been injured, but rather whether the extent of the injury was so difficult to ascertain that damages could not be awarded.

[12] Evidently the petitioners expect the Court simply to *assume* that antitrust law violations have occurred. This is consistent with the approach of plaintiff-petitioners throughout this litigation in that they have never squarely faced the issue of how and why maintenance of the five-cent charge should be held to violate the Sherman Act.

[13] That these questions have already been answered in the negative on the basis of factual findings of consequence only in this particular litigation is entirely apparent from the findings and conclusions of the District Court and from the *per curiam* opinion of the Court of Appeals.

[14] They are also without merit. We therefore undertake to answer them briefly and *seriatim*.

tioners claim (Pet. 12-18) that the District Court's Conclusion of Law 3 erred in defining the relevant anti-trust market too inclusively. The "part of trade or commerce" to which we must look in determining whether the defendant-respondents have monopolized, say the petitioners, must be limited to the confines of Harris' own business. *Ergo*, the defendant-respondents have monopolized.

But the *du Pont Cellophane* case, far from authorizing the kind of shooting-fish-in-a-barrel approach which the petitioners desire, makes it clear that a much broader view of the market is required. As the Court stated:

> "Every manufacturer is the sole producer of the particular commodity it makes, but its control . . . of the relevant market depends upon the availability of alternative commodities for buyers: i.e., whether there is a cross-elasticity of demand . . . This interchangeability is largely gauged by the purchase of competing products for similar uses considering the price, characteristics and adaptability of the competing commodities." 351 U.S. 377, 380-381.

The Court also made it clear in *du Pont Cellophane* (at p. 395) that "the varying circumstances of each [relevant market] case determine the result."

Although the petitioners expressly state that they do not challenge the District Court's Findings of Fact (Pet. 11),[15] the claim of their Point I that the auction market

[15] In view of the Court of Appeals' holding that it was "entirely satisfied that the findings of fact by the District Court were amply supported by the evidence", and in the light of the requirement of F.R.C.P. Rule 52 that findings of fact of the trial court must stand unless "clearly erroneous", petitioners would obviously have found it extremely difficult to make any such challenge. But despite their expression of acquiescence in the Findings of Fact, petitioners neverthe-

operated by the respondents is itself the relevant antitrust market (Pet. 12-19), runs afoul of Findings of Fact 9, 10, 12-19 and 40-43. In summary, these findings establish that:

1. Defendant-respondent H. Harris & Co., Inc. ("Harris") is in direct competition with Boston Market Terminal ("BMT") and Faneuil Hall Market ("Faneuil") in the business of maintaining facilities and furnishing services [16] in connection with the sale in Boston of fresh fruit and vegetable produce at wholesale in less-than-carload lots. (F/F 9, 14-15, 41).

2. The plaintiffs are fresh fruit and vegetable jobbers,[17] all of whom purchase at wholesale in less-than-carload lots both at BMT and at Harris. Most of them also buy at other local markets including, in many cases, Faneuil (F/F 10 and 40).

3. Although the lists of varieties and brands of fruit and vegetable produce available for purchase at any given time at the various markets are not co-extensive, they are substantially alike, and considerations of comparative price constitute the primary factor in determining which of these markets the buyers patronize to satisfy their current requirements (F/F 10, 14-16, 40).

4. The prices at which fresh fruits and vegetables are sold at the three principal markets (BMT, Harris and Faneuil) are mainly determined by the laws of supply and demand (F/F 14 and 40).

5. Harris' control over the charges it makes to its cus-

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less devote considerable discussion to certain evidence at the trial, as if to suggest that there is something wrong with the Findings, and as though the District Court had been required to believe the testimony of plaintiffs' witnesses. (See, e.g., Pet. 16-18, 21-22).

[16] "Harris does not own any produce nor does it act for any person in the purchase or sale of produce, except that it acts for the sellers in collecting for them the proceeds of sales." (F/F 9).

[17] For the purpose of this action they describe themselves as "buyers". They sell primarily to retail stores, but also to hotels, restaurants and others. (F/F 10).

tomers for its own services and facilities is severely limited by a cross-elasticity of demand (on the part of both buyers and sellers) for the services and facilities available at the three principal markets. (F/F 42).

6. "Sunkist" brand citrus products are in direct competition in the less-than-carload-lot wholesale market in Boston with other brands of citrus products. (F/F 43).

Thus the District Court's Findings of Fact, read in connection with the *du Pont Cellophane* case and other applicable authority,[18] effectively demolish the claim that the defendant-respondents have possessed or exercised monopoly power—whether that power is alleged to be (a) over the supply and prices of wholesale fresh citrus and deciduous fruit in the New England area, as originally charged,[19] or (b) over the fresh fruit and vegetable *auction marketing facilities and services* in the area, as now claimed.

The petition appears to take the position that the illegal monopoly power allegedly possessed by Harris derives from its supposed monopoly-in-fact in the business of offering auction marketing facilities and services to wholesale buyers and sellers of fresh fruit and vegetable produce, as augmented by its alleged control over the supposedly vital supply of Sunkist products. This is an unsound position both on the facts and on the law. Harris has no monopoly-in-fact on the auction method of marketing fresh fruit and vegetable products at wholesale since, as the evidence showed, a firm called Sweeney, Lynes also uses the auction method (R. 255). For that matter, there

[18] See, e.g., *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir. 1957), cert. den. 355 U.S. 822 (1957); *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387 (S.D.N.Y. 1957), aff'd. 259 F.2d 524 (2d Cir. 1958). And cf. *United States* v. *du Pont & Co.*, [illegible] (1957); *International Boxing Club of New York, Inc.* v. *United States*, 79 S. Ct. 245 (1959).

[19] R. 14-15. See footnote 5, *supra*.

was not a shred of evidence that the other wholesale markets, such as BMT, could not adopt the auction method at will. Furthermore, it is clear that Harris has had no commitment from Sunkist that the latter would sell all or any part of its Boston shipments through Harris (R. 329-331). And the contract between the parties (Ex. 5)—which in any case is terminable at will by either party on thirty days' notice to the other—does not preclude Harris in any measure from handling the sale of any competing citrus product.

Even if Harris were to have an exclusive right to sell all of Sunkist's citrus products in the Boston wholesale market, this would still not constitute monopolization under the cases, in view of the directness of the competition in which Sunkist products are engaged with other brands of citrus products (F/F 43). It is undisputed that it is impossible for anyone to differentiate Sunkist oranges from any other brand of oranges if the label is removed (R. 145), and the petitioners' own witnesses testified that whether they purchased Sunkist or non-Sunkist products depends upon what the relative prices are at any given time. (See, e.g., R. 258-259). Thus, in the words of the *du Pont* case, *supra*, Sunkist products are at least as "interchangeable by consumers" with other brands of citrus as cellophane is with other flexible wrappings, (*United States v. du Pont & Co.*, 351 U.S. 377), or as Packard cars are with other makes of automobiles, (*Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418), or as beet sugar is with cane sugar, (*American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387).

C. The Defendant-Respondents Did Not Combine or Conspire to Restrain Trade in Violation of Section 1 of The Sherman Act.

Point II of the petition attacks the District Court's conclusion that "the defendants did not combine or conspire among themselves, or with anyone else, to accomplish anything forbidden by the antitrust laws" (C/L 1). This conclusion, say the petitioners, is predicated on an erroneous rule of law—namely, that a conspiracy in restraint of trade cannot be said to exist if the only "conspirators" are a corporation and its officers and directors acting solely within the scope of their employment (Pet. 20). Nevertheless this rule has not been directly challenged by any decision which we have discovered.[20] Moreover, the petition is most

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[20] Accord: *Mackey* v. *Sears, Roebuck & Co.*, 237 F.2d 869, 873 (7th Cir. 1956); *Hudson Sales Corp.* v. *Waldrip*, 211 F.2d 268, 273 (5th Cir. 1954), cert. den. 348 U.S. 821 (1954); *Nelson Radio & Supply Company* v. *Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), cert. den. 345 U.S. 925 (1953); *Fleetway, Inc.* v. *Public Service Interstate Transportation Co.*, 72 F.2d 761, 763 (3rd Cir. 1934), cert. den. 293 U.S. 626 (1934); *Packaged Programs* v. *Westinghouse Broadcasting Co.*, 156 F. Supp. 76 (W.D. Penn. 1957); *Herren Candy Co.* v. *Curtiss Candy Co.*, 153 F. Supp. 75 (N.D. Ga. 1957); *Alexander* v. *Texas Co.*, 149 F. Supp. 37 (W.D. La. 1957); *Cott Beverage Corp.* v. *Canada Dry Ginger Ale*, 146 F. Supp. 300, 301 (S.D.N.Y. 1956); *Hershel California Fruit Produce Co., Inc.* v. *Hunt Foods, Inc.*, CCH 1955 Trade Cases, ¶67,928 (N.D. Cal. 1954); *Marion County Cooperation Association* v. *Carnation Company*, 114 F. Supp. 58, 62-63 (W.D. Ark. 1953), aff'd. 214 F.2d 557 (8th Cir. 1954); *Windsor Theatre Co.* v. *Wallbrook Amusement Co.*, 94 F. Supp. 388, 396 (D. Md. 1950); *Neumann* v. *Bastian-Blessing Co.*, 70 F. Supp. 447, 449-450 (N.D. Ill. 1947); *Atlanta Brick Co.* v. *O'Neal*, 44 F. Supp. 39, 42 (E.D. Tex. 1942); *Arthur* v. *Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824, 829-830 (D. Md. 1938); *United States* v. *Quaker Oats Company*, 232 Fed. 499, 500 (N.D. Ill. 1916). See also *Times-Picayune* v. *United States*, 345 U.S. 594, 626 (1953); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 183 (1944); McQuade, *Conspiracy, Multi-Corporation Enterprises and Section 1 of the Sherman Act*, 41 Va. L. Rev. 183, 184 (1955); Searls, *The Antitrust Laws from the Viewpoint of a Private Practitioner*, 1950 Institute on Antitrust Laws and Price-Regulations, 71, 86 (1950).

inaccurate in suggesting that the sole factual basis for invocation of the rule by the District Court, and for its Conclusion of Law No. 1, was its finding that the individual defendant-respondents never took any action in the premises other than as officers and directors of Harris. Quite clearly the Court's conclusion was also based on the following additional findings, among others:

1. There was no evidence that the defendant-respondents ever intended to restrain or monopolize the marketing or sale of produce or that they ever expected to do business other than in competition with other Boston markets (F/F 31-32).

2. The defendant-respondents have not engaged in any predatory business practices, nor have they discriminated as between persons, or classes of persons, similarly situated (F/F 31-32, 34, 38-39).

3. Harris' action in maintaining the five-cent charge was entirely justified by legitimate business reasons and has tended on the whole to stimulate rather than to restrain competition. (F/F 12-13, 18, 20-25, 33, 35-39; see also C/L 2).

In a word, the District Court's Findings of Fact, which have been accepted as amply supported by the evidence, both by the Court of Appeals and by the petitioners themselves, conclusively establish that the defendant-respondents have imposed no unreasonable restraints upon trade or commerce at any distributive level, and that they have not sought to do so. Hence, as pointed out above, the question of what constitutes a "conspiracy" is of peripheral interest only in this case.

D. The Plaintiff-Petitioners Have Not Made a Showing of Injury to Their Business or Property Sufficient to Sustain an Action Under Section 4 of the Clayton Act.

Point III of the petition urges that the District Court's Conclusion of Law No. 5 is contrary to established principles concerning standing to sue under § 4 of the Clayton Act.

It is elementary that in a private action for treble damages under § 4, as in any other action of tort, it is necessary for the plaintiff to prove:

1. That he has been injured;[21]
2. That the injury was proximately caused by the wrongdoing of the defendant,[22] and
3. That a reasonable basis exists, under all the circumstances, for computing the approximate amount of damages thus incurred.[23]

Only when the plaintiff has established these three points does it become necessary to undertake actual computation of damages.

In this case the plaintiff-petitioners made no effort to prove at the trial that the buyers absorbed any part of the five-cent charge (as opposed to passing it along to their customers), and, indeed, the only testimony on the point indicated quite clearly that the records of the plaintiffs

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[21] See, e.g., *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.*, 138 F.2d 967, 970 (7th Cir. 1943), cert. den. 321 U.S. 792 (1944), and authorities there cited.

[22] See, e.g., *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931).

[23] See, e.g., *Dipson Theatre* v. *Buffalo Theatres*, 86 F. Supp. 716, 719 (W.D. N.Y. 1949), aff'd. 190 F.2d 951 (2nd Cir. 1951).

were not adequate to establish whether any loss had been incurred as a result of the five-cent charge.[24]

Petitioners claim that since it was admitted that all the plaintiffs paid five-cent charges to Harris, this establishes *ipso facto* that plaintiffs were injured in their business or property by reason of an antitrust law violation. We know of no authority which permits, much less requires, such a view. To be sure, it was not incumbent upon the plaintiffs to adduce evidence at the trial to show the *extent* to which they had been damaged by the five-cent charge.[25] However, it was the view of the District Court that at least some indication of an adverse impact from the five-cent charge upon the business of the plaintiffs should be forthcoming as a part of the plaintiffs' case on liability. Yet, as the District Court found, there was absolutely no evidence that the five-cent charge caused or tended to cause a decrease in the volume of purchases at the auction, a loss in gross or net revenue to the plaintiffs, a decrease in the number of buyers at the auction, or an increase in the prices of citrus or deciduous fruits in the wholesale market in Boston (F/F 35). In fact, the evidence tended to indicate the reverse: i.e., that by instituting[26] and maintaining the five-cent charge the long-term trend of progressive domination of the market by the Boston Market Terminal was halted, supplies of fresh fruit and vegetables coming into the wholesale market in Boston were increased, and competition was enhanced. (F/F 19-21, 36-37, 41; R. 432).

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[24] See F/F 41-42. The evidence tended to show that the plaintiffs have not kept records sufficient to satisfy the standards imposed by §9 of the Perishable Agricultural Commodities Act of 1930 (7 U.S.C. Sec. 499i; 46 Stat. 535) and regulations promulgated by the Secretary of Agriculture thereunder. See, e.g., R. 235-239.

[25] This was stipulated by counsel at the commencement of the trial (R. 35-37).

[26] The five-cent charge was first instituted by the vendor of Harris and was simply maintained by defendant-respondents. (F/F 25, 30).

Conclusion

It is respectfully urged that, for the reasons indicated, the writ of certiorari prayed for by the petitioners should be denied.

Respectfully submitted,

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